

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Joseph Page,

Plaintiff,

v.

Shumaker Mallory, LLP, *et al.*,

Defendants.

Case No. 2:21-cv-02002-KJD-BNW

ORDER re ECF Nos. 31, 33

Before the Court is Defendants' second motion to stay discovery. ECF No. 31. Plaintiff opposed the motion (ECF No. 35), and Defendants replied (ECF No. 36). The parties are familiar with the background and procedural posture of the case. As a result, the Court does not repeat it here. For the reasons discussed below, the Court will grant the second motion to stay discovery (ECF No. 31).

I. Parties' Arguments

Defendants move to stay discovery pending a decision on their two motions to dismiss (ECF Nos. 5 and 6). First, Defendants argue that discovery must be stayed pursuant to NRS § 41.660. Next, they argue that a discovery stay is appropriate under *Kor Media Grp., LLC v. Green*, 294 F.R.D. 579 (D. Nev. 2013).

Plaintiff opposes the motion to stay discovery. As to the argument surrounding NRS § 41.660, Plaintiff argues that Defendants have not made a sufficient showing under that statute permitting a stay of discovery. As to the test under *Kor Media*, he argues the Court cannot be convinced that either of Defendants' motion to dismiss will be granted as the Court is in the midst of deciding them. He also argues Fed. R. Civ. P. 1 weighs in favor of unnecessary delay, which translates into commencing discovery.

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II. Legal Standard

The Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery because a potentially dispositive motion is pending. *Skellerup Indus. Ltd. v. City of L.A.*, 163 F.R.D. 598, 600-01 (C.D. Cal. 1995).

A court may, however, stay discovery under Federal Rule of Civil Procedure 26(c). Fed. R. Civ. P. 26(c)(1); *Clardy v. Gilmore*, 773 F. App'x 958, 959 (9th Cir. 2019) (affirming stay of discovery under Rule 26(c)). The standard for staying discovery under Rule 26(c) is good cause. Fed. R. Civ. P. 26(c)(1) (the court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including forbidding discovery or specifying when it will occur).

The Ninth Circuit has not provided a rule or test that district courts must apply to determine if good cause exists to stay discovery. *Salazar v. Honest Tea, Inc.*, No. 213CV02318KJMEFB, 2015 WL 6537813, at *1 (E.D. Cal. Oct. 28, 2015) (“The Ninth Circuit has not provided guidance on evaluating a motion to stay discovery pending resolution of a potentially dispositive motion, other than affirming that district courts may grant such a motion for good cause.”); *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 2:10-CV-02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011) (“The Ninth Circuit Court of Appeals has not announced a clear standard against which to evaluate a request or motion to stay discovery in the face of a pending, potentially dispositive motion.”).

The Ninth Circuit has, however, identified one scenario in which a district court may stay discovery and one scenario in which a district court may *not* stay discovery. The Ninth Circuit has held that a district court *may* stay discovery when it is convinced that the plaintiff will be unable to state a claim upon which relief can be granted. *See Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (“A district court may limit discovery ‘for good cause’, Rule 26(c)(4), Federal Rules of Civil Procedure, and may continue to stay discovery when it is convinced that the plaintiff will be unable to state a claim for relief.”); *B.R.S. Land Invs. v. United States*, 596 F.2d 353, 356 (9th Cir. 1979) (“A district court may properly exercise its discretion to deny discovery where, as here, it is

1 convinced that the plaintiff will be unable to state a claim upon which relief can be granted.”).¹
 2 The Ninth Circuit has also held that a district court may *not* stay discovery when discovery is
 3 needed to litigate the dispositive motion. *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d
 4 378, 383 (9th Cir. 1993) (district court would have abused its discretion in staying discovery if
 5 the discovery was necessary to decide the dispositive motion); *Kamm v. Cal. City Dev. Co.*, 509
 6 F.2d 205, 210 (9th Cir. 1975) (same).

7 Based on this Ninth Circuit law, district courts in the District of Nevada typically apply a
 8 three-part test to determine when discovery may be stayed.² *See, e.g., Kor Media*, 294 F.R.D. at
 9 579. This Court will refer to this test as the “preliminary peek test.” The preliminary peek test
 10 asks whether (1) the pending motion is potentially dispositive; (2) the potentially dispositive
 11 motion can be decided without additional discovery; and (3) after the court takes a “preliminary
 12 peek” at the merits of the potentially dispositive motion, it is “convinced” that the plaintiff cannot
 13 state a claim for relief. *Id.* at 581. If all three questions are answered affirmatively, the Court may
 14 stay discovery. *Id.* The point of the preliminary peek test is to “evaluate the propriety of an order
 15 staying or limiting discovery with the goal of accomplishing the objectives of Rule 1.” *Tradebay,*
 16 *LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D. Nev. 2011). Rule 1 provides that the Federal Rules of
 17 Civil Procedure should be construed “to secure the just, speedy, and inexpensive determination of
 18 every” case. Fed. R. Civ. P. 1.

19 This Court, however, has found the preliminary peek test to be problematic because it is
 20 often inaccurate and inefficient.

21 First, applying the preliminary peek test does not always lead to “accurate results” in
 22 which the cases that will ultimately be dismissed are stayed and vice versa. This is so for two
 23 primary reasons. In the District of Nevada, a magistrate judge applies the preliminary peek test
 24 and decides whether discovery should be stayed; however, a district judge decides the dispositive

26 ¹ The Court interprets both these Ninth Circuit cases as providing one scenario in which it is appropriate to stay
 27 discovery but not the only scenario. *See also Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (affirming stay of
 28 discovery without discussing whether court was convinced plaintiff could not state a claim before entering stay); *Rae*
v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984) (same); *Clardy v. Gilmore*, 773 F. App’x 958, 959 (9th Cir. 2019)
 (same).

² The Court notes that these District of Nevada cases are persuasive authority, and the Court is not bound by them.

1 motion. These judges sometimes have different views on the merits of the dispositive motion,
2 leading to discovery being stayed in some cases it should not have been stayed in and vice versa.
3 *See also* Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay*
4 *Discovery When A Motion to Dismiss Is Pending*, 47 Wake Forest L. Rev. 71, 97 (2012)
5 (identifying same issue). Additionally, the test requires the magistrate judge to take a
6 “preliminary peek” (i.e., a superficial look) at the dispositive motion and be *convinced* that the
7 plaintiff cannot state a claim for relief before staying discovery. *Kor Media*, 294 F.R.D. at 583-84
8 (discovery stay inappropriate when there is only “a possibility” defendant will succeed on its
9 dispositive motion; “[g]enerally, there must be *no question* in the court’s mind that the dispositive
10 motion will prevail . . .”). When the preliminary peek test is applied as written, it leads to
11 discovery being stayed in only the simplest, legally baseless cases. For most cases, and certainly
12 complex cases, it is impossible for the Court to do a “preliminary peek” and be *convinced* that the
13 plaintiff cannot state a claim. This is problematic because complex cases, in which discovery will
14 be extremely costly, are the types of cases where discovery stays may be particularly appropriate
15 while a dispositive motion is pending (to accomplish the goals of Rule 1). Nevertheless, the
16 preliminary peek test, applied as written, leads to most motions to stay discovery being denied.
17 Accordingly, the preliminary peek test is not well-suited for sorting which cases will be dismissed
18 (and thus should have discovery stayed) from those cases that will proceed (and thus should *not*
19 have discovery stayed).

20 Second, the preliminary peek test is inefficient. As just explained, if the preliminary peek
21 test is applied as written (i.e., the Court must be *convinced* after a superficial look at the
22 dispositive motion that the plaintiff cannot state a claim), it often fails to accurately sort those
23 cases that will be dismissed (and should have discovery stayed) from those cases that will proceed
24 (and should not have discovery stayed). To improve the accuracy of the preliminary peek test
25 (and allow discovery stays in cases in which this Court believes the dispositive motion will be
26 granted), this Court has in the past engaged in a full analysis of the dispositive motion. This takes
27 considerable time and delays providing the parties with a decision on the motion to stay
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1 discovery.³ It is also an inefficient use of judicial resources because both the magistrate judge and
2 the district judge fully analyze the same dispositive motion. And, even after all this effort, the
3 magistrate judge and district judge may still have different views on the merits of the dispositive
4 motion. *See also* Lynch, *When Staying Discovery Stays Justice*, 47 Wake Forest L. Rev. at 101
5 (noting that having two different judges decide the dispositive motion and the motion to stay
6 discovery introduces burden and error into the preliminary peek test). In short, doing a full
7 analysis of the dispositive motion may improve the accuracy of the preliminary peek test, but it
8 takes significant time, duplicates effort, delays providing the parties a decision on whether
9 discovery is stayed, and may still lead to discovery being inappropriate stayed or allowed to
10 proceed.

11 This Court believes a better analytical framework exists for determining when motions to
12 stay should be granted. As the Court previously discussed, it may grant motions to stay discovery
13 when a dispositive motion is pending if (1) the dispositive motion can be decided without further
14 discovery; and (2) good cause exists to stay discovery. *See Alaska Cargo Transp.*, 5 F.3d at 383
15 (district court would have abused its discretion in staying discovery if the discovery was
16 necessary to decide the dispositive motion); *Kamm*, 509 F.2d at 210 (same); Fed. R. Civ. P.
17 26(c)(1) (the Court “may, for good cause, issue an order to protect a party or person from
18 annoyance, embarrassment, oppression, or undue burden or expense,” including forbidding
19 discovery or specifying when it will occur). “The burden is upon the party seeking the order to
20 ‘show good cause’ by demonstrating harm or prejudice that will result from the discovery.”
21 *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004). As the Court will discuss in more
22 detail below, good cause may be established using the preliminary peek test, but it may also be
23 established by other factors, not related to the merits of the dispositive motion.

24 The Ninth Circuit has held that good cause to stay discovery may exist when the movant
25 can convince the court that plaintiff cannot state a claim. *See Wood*, 644 F.2d at 801 (district
26 court may stay discovery when it is convinced that plaintiff will be unable to state a claim); *B.R.S.*

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28 ³ This delay often also creates a *de facto* stay of discovery, which is problematic in and of itself.

1 *Land Invs.*, 596 F.2d at 356 (same). These cases remain valid authority, and litigants may still
2 move for a discovery stay under the preliminary peek test.

3 That said, good cause may exist based on other factors unrelated to the merits of the
4 dispositive motion. In many cases, the movant seeks a stay of discovery to prevent “undue burden
5 or expense.” *See* Fed. R. Civ. P. 26(c)(1). Ultimately, guided by Rule 1 of the Federal Rules of
6 Civil Procedure, the Court is trying to determine “whether it is more just to speed the parties
7 along in discovery and other proceedings while a dispositive motion is pending, or whether it is
8 more just to delay or limit discovery and other proceedings to accomplish the inexpensive
9 determination of the case.” *Tradebay*, 278 F.R.D. at 603.

10 **III. Analysis**

11 Here, Plaintiff does not claim he needs discovery to oppose the pending motions to
12 dismiss.

13 In addition, while the Court tends to agree with Defendants that the pending motions to
14 dismiss will be granted, it is also persuaded that good cause exists to stay discovery given several
15 other factors. First, there are two pending motions to dismiss the instant case—not just one.
16 Moreover, while not binding on this Court, the Court takes note of the fact that the Nevada
17 legislature intended an automatic stay of discovery when motions to dismiss are filed under NRS
18 § 41.660. Such a motion was filed here. *See* ECF No. 6. Further the Court disagrees with
19 Plaintiff’s reading of the statute: the stay of discovery is automatic unless NRS § 41.660(4) is at
20 play (which is not the case here).

21 Lastly, given the parallels between this case and case No. 21-cv-103-KJD-EJY, the Court
22 agrees that subjecting Defendants to embark on discovery would result in an inappropriate and
23 duplicative effort.

24 Ultimately, the Court finds that “it is more just to delay . . . discovery . . . to accomplish
25 the inexpensive determination of the case” than to “speed the parties along in discovery . . . while
26 a dispositive motion is pending.” *Tradebay*, 278 F.R.D. at 603.

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1 **IV. Conclusion**


2 **IT IS THEREFORE ORDERED** that Defendants' second motion to stay discovery
3 (ECF No. 31) is GRANTED.

4 **IT IS FURTHER ORDERED** that the parties' proposed Discovery Plan and Scheduling
5 Order (ECF No. 33) is DENIED as moot.

6 **IT IS FURTHER ORDERED** that, if applicable, the parties must file a proposed
7 Discovery Plan and Scheduling Order within 14 days of the motions to dismiss being decided.

8 **IT IS FURTHER ORDERED** that the motion hearing set for May 12, 2022 is
9 VACATED.

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11 DATED: April 29, 2022.

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14 BREND A WEKSLER
15 UNITED STATES MAGISTRATE JUDGE
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